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IN THE

SUPREME COURT OF THE UNITED STATES

October 1998 Term

Raymond B. Sherwood

Petitioner,

v.

Marilyn Hall Patel

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Raymond B. Sherwood
1612 Merian Drive
Pleasant Hill, California 94523
(925) 827-2604
IN PROPRIA PERSONA

QUESTIONS PRESENTED FOR REVIEW

Issue 1:

Whether respondent had jurisdiction to issue an Order.

Issue 2:

Whether petitioner was denied due process.

Issue 3:

Whether respondent's actions constitute judicial immunity.

Issue 4:

Whether respondent is immune from responding to a Complaint.

Issue 5:

Whether Judge Wilken acted as an attorney from the bench in defending respondent Marilyn Hall Patel.

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IN THE
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Petition for a Writ of Certiorari To the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Raymond B. Sherwood hereby petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The ruling of the District Court, Case No. CV 97-02796 CW, ORDER OF DISMISSAL filed Jan. 13,1998, was a denial of petitioner's Complaint and is included herein as part of the Appendix, page A-1.

The Order Reaffirming Dismissal of Case was filed March 10, 1998, and is included herein as part of the Appendix, page A-2.

The official publisher opinion of the Ninth Circuit Court of Appeals filed July 24, 1998, affirmed the District Court, is published as a MEMORANDUM in Sherwood v.

Patel, No. 98-15496, and is included herein as part of the Appendix, page A-3.

The Ninth Circuit Court of Appeals ORDER denying petition for rehearing was filed Dec. 3, 1998 and is included herein as part of the Appendix, page A-4.

STATEMENT OF JURISDICTION

Jurisdiction of the federal District Court below was pursuant to 28 USC Sec. 1331; Sec. 1340; 1343(a) (1), (3) and (4). Its ruling on the issue appealed was on Jan. 13, 1998.

Jurisdiction of the Ninth Circuit Court of Appeals was pursuant to 28 USC Sec. 1291. The Decision in the Ninth Circuit was entered as a Memorandum on July 20, 1998, and petitioner's timely filed Petition for Rehearing was denied on December 3, 1998.

The petitioner's Motion to Recall Mandate; Suggestion for Hearing En Banc is pending.

Jurisdiction of the United States Supreme Court to review the ruling of the Ninth Circuit by Writ of Certiorari is conferred pursuant to 28 USC Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution (Due process requirements).

4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5th Amendment:
...nor be deprived of life, liberty, or property, without due process of law;

United States Constitution Article II Section 1.
[1] The executive Power shall be vested in a President of the United States of America. (Re:Separation of powers between the Executive, Judicial, and Legislative branches of government.)
Article VI Section 3.
]...and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation , to support this Constitution...

Title 1 USC Section 204(a). United States Code.
Provided, however, that whenever titles of such Code shall have been enacted into positive law the text thereof shall be legal evidence of the laws therein contained, in all the courts of the United States....
(NOTE: Title 26 is conspicuous by its absence.)

Title 4 USC Section 71.
Agency regulations are limited to all territory of the United States included within the present limits of the District of Columbia.

Title 4 USC Section 72.
All offices attached to the seat of government shall be exercised in the District of Columbia, and not elsewhere, except as otherwise expressly provided by law.
Title 5 USC Section 552 et seq.
...for general application statutes at large must be promulgated in the Federal Register...

Title 5 USC Section 558:
(b) Government Organization and Employees. A sanction may not be imposed or a substantive rule of order issued

except within jurisdiction delegated to the agency and as authorized by law.

Internal Revenue Code Chapter 76
Chapter 76 Judicial Proceedings of the Internal Revenue Code Sections 7401 to 7492 relate to the matters of civil action, jurisdiction and due process by the use of the Attorney General, and the Judicial branch of government via the Federal Debt Collection Procedures Act.

The Legal Reference Guide for Revenue Officers. Page 57(16) 0-106 (1-14-87) 422. Authorization.
(1) The authority for the United States to commence a court action for the recovery of taxes is provided for by IRC 7401, as follows: No civil action for the collection or recovery of taxes , or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced. (2) The Attorney General has not delegated the authority to direct the institution of such a proceeding to the United States Attorney. The Secretary of the Treasury has delegated his power of authorization to the Chief Counsel of the Internal Revenue. Where the commencement of such an action has not been authorized or sanctioned it is subject to dismissal. Civil actions commenced under this provision must be brought in the name of the United States and not an official thereof.

26 USC Section 7401:
(a) In General. No civil action for the collection or recovery of taxes,... shall be commenced unless the Commissioner or his delegate
(b) authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.

Title 26 USC Section 7402
...at the instance of the United States....by an appropriate process...to grant the court jurisdiction.

Title 26 USC Sec. 7602 (a) Authority to summon, etc.
(l) **Limitation of Authority**. No summons may be issued under this title and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person...

Title 26 USC Section 7604.(a) Jurisdiction of district court.
... the United States district court for the district in which such person resides or is found shall have jurisdiction by **appropriate process**...

Title 26 Code of Federal Regulations, Part 601
...supports the mandate for regulations to be published in the Federal Register before they have general application...

Title 1 Code of Federal Regulations Section 21.21 General requirements: References.
(c) Each agency shall publish its own regulations in full text. Cross-references to the regulations of another agency may not be used as a substitute for publication in full text, unless the Office of the Federal Register finds that the regulation meets any of the following exceptions:
(1) The reference is required by court order, statute, Executive order or reorganization plan. The reference is to regulations promulgated by an agency with the exclusive authority to regulate in a subject matter area, but the referencing agency needs to apply those regulations to its own programs.

Title 44 USC Section 1500 et seq.
...statutes at large must be promulgated in the Federal Register...

Title 26 Code of Federal Regulations Section 601.106(f)(1) Rule 1.
An exaction by the U.S. Government which is not based on law, statutory or otherwise, is a taking of property without due process of law in violation of the 5th Amendment to the U.S. Constitution.

Title 28 USC Section 454. Practice of law by justices and judges.
Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.

Title 28 USC Sec. 547
This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule.

Title 31 USC Section 301(a)(b)
...the Secretary of the Treasury is appointed by the President and approved by the Senate, and specifies that as the head of an Executive Department he may prescribe regulations for the government of his department, his agency, and his employees, and at the Seat of government.

Title 42 USC Section 1983
Officers of the court have no immunity from liability when violating a constitutional right and may be held personally liable for damages under Sec. 1983, for they are deemed to know the law. Knowing that they will be liable for all injurious conduct creates incentives for officials to err on the side of protecting citizens constitutionally protected rights. When they do so at their own peril.

2 Am Jur 2d Section 55.
Being creatures of the legislature, administrative agencies have no general, inherent, or common-law powers, but only

those powers conferred upon them by the legislature. ...the source of the powers of administrative agencies lies in statutes, and administrative agencies must find within statutes warrant for the exercise of any authority which they claim.

2 Am Jur Section 152. General nature and basis of authority. It is fundamental law that the legislature can delegate to an administrative agency the power to make rules and regulations to implement a statute. Thus, the origin of the rulemaking capacity is the delegation from the legislature, not a constitutional grant of power to the executive and all rulemaking authority delegated to the administrative agency is limited and defined by the statute conferring the power. Consequently, in the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature. An agency may not promulgate a regulation that adds a requirement that does not exist under the statute. An agency cannot create, remove, or limit substantive rights granted in the enabling act and an agency cannot, without sufficient criteria expressed in the statute, vary the impact of a statute by restricting or limiting its operation through creating waivers or exemptions.

16 Am Jur 2d Section 439. Constitutional guarantees - Generally. Constitutional guarantees can not be imposed upon or destroyed under the guise or device of being regulated. Individual rights under our Constitution are immutable against all hostile legislation, which is not required by consideration of public health or safety, and if a law has no other purpose than to chill the assertion of fundamental Constitutional rights by penalizing those who chose to exercise them, then it is patently unconstitutional. The citizens of a free government are justly jealous of their constitutional rights and privileges and this should be

attributed to them as a virtue rather than a fault. It keeps them on the alert and inspires them with the courage and determination in their efforts to resist the aggressions of arbitrary power. It is just as obligatory upon the citizens to resist encroachments upon the rights and liberties guaranteed by the Constitution as it is for him to uphold and maintain its integrity.

16 Am Jur Section 552. Due Process.
The Constitution provides that neither Congress nor the states may deprive any person of life, liberty, or property without due process of law.

16 Am Jur Section 581
The right of property has been described as a fundamental, natural, inherent right. It is not ex gratia from the legislature but ex debito from the Constitution. It existed before the Constitution which protect it. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government.

20 Am Jur Section 59. Jurisdiction.
...jurisdiction is the power to decide erroneously as well as correctly. The distinction between lack of jurisdiction and any other error affecting a decision of a court is important, since when a court lacks jurisdiction its decision, right or wrong, is void and subject to collateral attack.

46 Am Jur 2d Section 82. Acts under invalid law or in excess of jurisdiction. The scope of judicial jurisdiction is generally broadly construed, such that judges who posses jurisdiction are not deprived of absolute immunity by the mere fact that they act upon a void or invalid law, and absolute immunity will apply to judges acting in the exercise of their judicial functions even if the acts are in excess of their jurisdiction or authority. Thus, a distinction must be observed between acts which are merely in excess of

jurisdiction and those involving a clear absence of all jurisdiction over the subject matter. Excess of jurisdiction, as distinguished from the entire absence of jurisdiction, means the act, although within the general power of the judge, is not authorized, and therefore void with respect to the particular case, because the conditions which alone authorized the exercise of the general power in that particular case are wanting, and hence the judicial power is not in fact lawfully invoked. Where there is clearly no jurisdiction over the subject matter, any authority exercised is unsurped authority, and no excuse is permissible if the judge knows of his or her lack of authority.

47 Am Jur Section 933. Generally.
The general rule is that the absence of jurisdiction of a court to render a particular judgment constitutes sufficient cause for a collateral attack upon the judgment by a party whose rights or interests are adversely affected by the judgment, whenever it is sought to be enforced, or in any suit in which its validity is drawn into question, whether the absence of jurisdiction is in regard to the subject matter, the parties, or in proceedings in rem...

Federal Rules of Civil Procedure Rule 8 (In general)
Requires a responsive pleading and establishes penalties for failure to respond.

Federal Rules of Civil Procedure Rule 8(b)
Defenses: Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the avertments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of the avertment, the party shall so state and this has the effect of a denial.

Federal Rules of Civil Procedure Rule 8(c)
A defendant must plead any matter constituting an

avoidance or affirmative defense.

Federal Rules of Civil Procedure Rule 8(d)
Effect of Failure to Deny. Avertments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

Federal Rules of Civil Procedure Rule 12(b)
How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made at motion.

Federal Rules of Civil Procedure Rule 12(h)(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Code of Federal Regulations, Chapter 1. ...supports the mandate requiring statutes be published in the Federal Register before they have general application.

Parallel Table of Authorities
This document (A-43) does not exhibit any of the required implementing regulations supporting Title 26.

STATEMENT OF THE CASE

This petition for a writ of certiorari is filed under this Court's Rule 10 and is necessary because the United States court of appeals for the Ninth District has sanctioned a lower court decision that has so far departed from the accepted and usual course of judicial proceedings, as to

call for an exercise of this Court's supervisory power, and answer an important question of federal law that should be settled by this Court.

Internal Revenue Agent F. Aguilera issued an Administrative Agency Summons (A-5) for tax years 1989, 1990 and 1991 and a Summons (A-6) for tax year 1994, both dated February 7, 1996. When petitioner (herein, Sherwood) refused to comply with the non-adjudicated document the agency filed a Verified Petition to Enforce Internal Revenue Summonses (A-7), and subsequently, on the same date, May 16,1996, respondent (herein, Patel) issued an Order to Show Cause Re Enforcement of Internal Revenue Service Summonses (A-8) along with an Order Setting Conference (A-9) indicating a Civil Action by the assignment of Case No. C 96-1828 MHP. Sherwood filed a Opposition Response to Verified Petition to Enforce Internal Revenue Service Summonses; Motion to Dismiss (A-10) on July 1, 1996, but Patel disregarded Sherwood's arguments and issued an Order Enforcing Summonses (A-11) dated July 30, 1996, to compel Sherwood to appear before F. Aguilera and give testimony and produce records, and on August 1, 1996 Patel issued a Supplemental Order (A-12) to support her original order. An Application and Order of Dismissal (A-13) was filed on September 20, 1996, requesting that the action be dismissed.

Sherwood filed a Complaint (A-14) No. C 97-2796 CW against Patel on July 30, 1997 citing Abuse of Legal Process; Ruling with Want of Jurisdiction and for Violation of Constitutional Due Process of Law, and the Order Setting Case Management Conference (A-15) was also filed on the same date calling for a case management conference on 10/31/97. When Patel failed to timely respond to the Complaint, Sherwood filed a Plaintiff's Motion for Judgment by Default by the Court (A-16) dated October 3, 1997. On October 6, 1997 Sherwood sent a letter (A-17) and included his Case Management Statement (A-18) to the presiding judge Claudia Wilken, explaining Patel's failure to respond

to the Complaint prevented a "joint" Case Management Statement. Judge Wilken issued an Order Continuing Case Management Conference (A-19) on October 31, 1997 based on her opinion Sherwood's Service was not in accordance with FRCP Rule 4(i) and continuing the Case Management Conference to January 9. 1998. On November 3, 1997 Judge Wilken issued an Order Denying Plaintiff's Motion for Default Judgment (A-20). Sherwood filed Plaintiff's Motion to Vacate Order Continuing Case Management Conference (A-21) on November 12, 1997 along with Plaintiff's Motion to Vacate Order Denying Plaintiff's Motion for Default Judgment (A-22). Sherwood received a letter from Assistant U.S. Attorney Susan Kamlet (A-23) dated November 23, 1997, advising the procedures of FRCP Rule 4(i). Sherwood responded with his letter (A-24) dated December 8, 1997 and asked Kamlet if she was representing Patel. The record will show U S Attorney S. Kamlet failed to respond to the question of representation. Sherwood filed Plaintiff's Motion for Leave to File a Motion for Reconsideration (A-25) on December 11, 1997, because of the courts failure to consider material facts, and the court's response dated December 18, 1997, Order Denying Plaintiff's Motion for Leave to File a Motion for Reconsideration (A-26). The court issued an Order of Dismissal (A-27) dated January 18, 1998, stating Assistant US Attorney S. Kamlet was present at the January 9, 1998 hearing representing Patel and the action is dismissed for failure to prosecute. Sherwood filed Plaintiff's Objection to Court's Order of Dismissal (A-28) on January 26, 1998, but on March 10, 1998, the court issued its Order Reaffirming Dismissal of Case (A-29) and ordered the clerk to close the file. Sherwood filed a Notice of Appeal (A-30) on March 20, 1998, and filed an Appellant's or Petitioner's Informal Brief (A-31) Case No. 98-15496, dated April 6, 1998. The Circuit Court filed a Memorandum (A-32) dated July 24, 1998, affirming the district courts decision and the order Affirming (A-33) this decision was filed and entered August

18, 1998. Sherwood filed a Motion to Recall Mandate (A-34) on August 17, 1998 and the court mistakenly denied this motion with a letter (A-35) dated August 18, 1998, citing timeliness which was followed by Sherwood's letter (A-36) dated August 25, 1998. The court recognized its mistake and recalled its mandate with a Order (A-37) dated August 31, 1998. Sherwood filed Appellant's Motion for Summary Disposition (A-38) on November 30, 1998, and the court issued an Order (A-39) on December 3, 1998, denying petition for rehearing. Sherwood filed a Motion to Recall Mandate, Suggestion for Rehearing En Banc (A-40) dated December 29, 1998.

REASONS THIS COURT SHOULD GRANT CERTIORARI

First, petitioner has been denied the Constitutional guaranteed due process by the District Court's failure to provide one solitary hearing for an opportunity to resolve issues. The District Court records, as supported by the court's docket (A-41) fails to indicate any evidence of a due process hearing. Due process is implicitly preserved by the Constitution and Title 28 USC Sec. 2463, which stipulates that any seizure under United States revenue laws will be deemed in the custody of the law and subject solely to disposition of courts of the United States with proper jurisdiction. Administrative convenience or necessity cannot override the requirement of due process as found in Russel-Newman Mfg. C. v. N.L.R.B. C.A. Tex. 1966 370 F.2d 1980.

Section 7401 is the necessary procedure to meet the Constitutional due process requirements of the 5th and 14th Amendments and where rights secured by the Constitution are involved there can be no rule making or legislation would abrogate them as found in Miranda v. Arizona, 384 U.S. 436 p. 491, but even if the respondent produced some statute to support the failure of due process, such statute would be declared unconstitutional as found in Marbury v. Madison, 5 U.S. 137, 180 (1803).

Patel is expected to know that failure to comply with the statutory requirement of Sec. 7401 would violate constitutional due process, but she opted to disregard the requirements of her oath of office and continued to act with impunity, which gives cause for this action as found in Pierson v. Ray, 386 U.S. 547, 554 (1967), and she has no immunity from liability for violating this Constitutional right as found in Owen v. Independence, 100 S. Ct. 1398. 1980 (445 U.S., 622 L. Ed. 2d 673); Maine v.Thiboutot, 1980, 100 S. Ct. 2502, 448 U.S. 1, 65 L. Ed. 2d 555, Removes judicial immunity; Hafer v. Melo, 502 U.S. 2l, 1991. Second, the only statutory provision for jurisdiction over private citizens envisioned by Congress for this administrative agency is Title 26 Sec. 7401, which requires a Complaint to acquire jurisdiction. Although Case Number C 96-1828 MHP indicates a complaint was filed, this is a false impression, because in this instance a Complaint does not exist, which is a fact acknowledged by Patel, (see: A-42 pg. 3 line 12 to 15). Therefore, without the 7401 required complaint, jurisdiction does not exist, as clearly found by the Court in U.S. v. Sims. Third, there is no statutory provision that allows a judge special provisions to avoid responding to a Complaint. However, Title 28 USC Sec. 547 states, "This and other statutes which provide 60 days for the United States, or an officer or agency thereof to answer or otherwise defend are continued by this rule." Response to a complaint is further supported by the Federal Rules of Civil Procedure Rule 8, which requires a responsive pleading and establishes penalties for failure to respond. This is also supported by FRCP Rule 12(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made at motion. But, respondent failed to make a defensive response, by motion or in any other manner. Fourth, FRCP

Rule 12(h) (3) states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Clearly the Transcript (A-42 pg. 3) indicates the petitioner challenged the court's jurisdiction by posing the question whether or not a complaint had been filed in this matter, and equally clear is Patel's response on line 14, "There is no complaint and there need not be in this kind of proceeding." which can only be an admission that Patel had no jurisdiction. This Court should grant certiorari and reconsider whether respondent lacked jurisdiction to render an Order; whether judicial immunity applies; and whether judicial immunity allows failure to respond to a verified complaint, which appears to petitioner to be a case of first impression. For each and all of the above stated reasons, petitioner's Petition for Certiorari should be granted.

ARGUMENT

Jurisdiction

Chapter 76 of the IRC is the correct procedure in place for the IRS to pursue action against "Private Citizens'. The Chapter 76 Judicial Proceedings of the Internal Revenue Code Section 7401 to 7492 covers the matters of civil action, jurisdiction and due process by the use of the Attorney General, and the Judicial branch of government via the Federal Debt Collection Procedures Act. Therefore, since there is NO evidence of authorization from the Secretary pursuant to Sec. 7401 and since Patel has admitted there was "NO COMPLAINT" (A-42 pg. 3 line 14) sent to the district court from the Attorney General pursuant to Sec. 7401 the respondent could not possibly have any jurisdiction in this matter.

Title 26 Section 7401.

No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless

the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that action be commenced. Civil Action is addressed in Federal Rules of Civil Procedure Rule 3. A civil action is commenced by filing a complaint with the court. Civil Action, as defined in Black's Law Dictionary: Action brought to enforce, redress, or protect private rights. ("Private Citizens" command "private rights"). Black's Law Dictionary, 6th Ed. Therefore, since no Complaint was filed, as admitted to by the respondent, there was no civil action to grant the agency authority or jurisdiction over the private citizen petitioner, and Section 7401 is jurisdictional as found in U.S. v. Sims. This Court holds that 26 USC Sec. 7401 requirements constitute facts essential to jurisdiction. This failure to prove jurisdictional facts when specifically denied is fatal to the maintenance of this action. This Court erred in hearing the case on the merits and now determines such hearing was a nullity and not amenable to effective order or judgment, except the order now made that this Court does not have jurisdiction over the subject matter. United States v. Ernist Sims, 355 F. Supp. 513 (1973). The agency has published a legal guide for its agents and officers to follow and references required procedures of Sec. 7401 in, The Legal Reference Guide for Revenue Officers page 57(16) 0-106 (1-14-87). 422. Authorization (1) The authority for the United States to commence a court action for the collection or recovery of taxes is provided for by IRC 7401, as follows: "No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced." (2) The Attorney General has not delegated the authority to direct the institution of such a proceeding to the United States Attorney. The Secretary of the Treasury has delegated his power of authorization to the Chief Counsel of Internal Revenue. Where the commencement of such an action

has not been authorized or sanctioned it is subject to dismissal. Civil actions commenced under this provision must be brought in the name of the United States and not an official thereof. Thus, the prescribed procedure requires two steps. The First step requires that, a civil action be authorized by the Secretary or his delegate. "Secretary", as defined in 26 USC Sec. 7701 means the Secretary of the Treasury. "Delegate", as defined in Sec, 7701 refers to one who is an employee of the Treasury Department securing his authority from the Secretary or by redelegation, directly or indirectly. **There is no evidence of compliance with the first step**. The Second step requires direction of the Attorney General or his delegate to commence the action. Sec. 7701 (a)(12) defines the term "or his delegate" when used in connection with any other official of the United States shall be similarly construed." and the term Attorney General under Sec. 7701(a)(22) means the Attorney General of the United States. **There is no evidence of compliance with the second step**. But even if these requirements had been met, the Secretary's authority is limited by Congress under statutory law. Title 31 USC Sec. 301(a)(b) confirms the Secretary of the Treasury is appointed by the President and "approved" by the single legislative body of the Senate. It specifies the Secretary of the Treasury as the head of an Executive Department may prescribe regulations for the government of his department, his agency and his employees and not the general public, as the clear import of the language confirms. Title 5 Sec. 301 also specifies that the Secretary is the head of an Executive Department at the Seat of government (Washington D.C.), which is limited to the executive department by the separation of powers under Article II Sec. 1 of the Constitution and is also limited under Title 4 USC Sec. 71 to all territory of the United States included within the present limits of the District of Columbia. Title 4 USC Sec. 72 states, "All offices attached to the seat of government shall be exercised in the District of Columbia,

and not elsewhere, except as otherwise expressly provided by law." The Definition of "Employee" is found in Title 5 USC Sec. 2105(a) for the purpose of this title Employee means a specific officer or employee of the government and not a private citizen. Therefore, the Secretary has no authority over Sherwood who is not a government employee and does not reside in Washington D.C. This is confirmed by 2 Am Jur Sec. 152. General nature and basis of authority. It is fundamental law that the legislature can delegate to an administrative agency the power to make rules and regulations to implement a statute. Thus, the origin of the rulemaking capacity is the delegation from the legislature, not a constitutional grant of power to the executive and all rulemaking authority delegated to the administrative agencies is limited and defined by the statute conferring the power. Consequently, in the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature. An agency may not promulgate a regulation that adds a requirement that does not exist under the statute. An agency cannot create, remove, or limit substantive right granted in the enabling act and an agency cannot, without sufficient criteria expressed in the statute, vary the impact of a statute by restricting or limiting its operation through creating waivers or exemptions. The agency's Verified Petition (A-6) will not meet the statutory requirements to provide jurisdiction for Patel in this action because Title 26 USC has not been enacted into positive law, as proven by Title 1 Sec. 204(a); the 1994 Preface page of the United States Codes as signed by Speaker of the House of Representatives, Newt Gingrich (A-44); page III Titles of the United States Code (A-45) and even if Title 26 were enacted the agency has failed the requirement that for general application, statutes at large must be promulgated in the Federal Register, pursuant to Title 44 USC Sec. 1500 et seq. This process is conformed in Title 5 USC Sec. 552 et seq.; CFR, Chapter 1; and Title 26 CFR,

Part 601, all supporting the mandate for regulations to be published in the Federal Register before they have general application. The Parallel Table of Authorities (A-43) does not indicate the agency complied with these requirements but has instead attempted to rely upon implementing regulations of Title 27, which is a violation of 1 CFR Sec. 21.21(c)(2) where one agency is prohibited from using another agencies implementing regulations and is supported by case law in U.S. v. Mersky...neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction to the other. United States v. Mersky, 361 US 431, 4 L. Ed 2d 423, 80 S. Ct. 459. Patel failed to verify the agency summonses followed statutory procedures required to establish jurisdiction over "private citizen" Sherwood prior to issuing her Order (A-10). Although Revenue Agent Aguilera falsely stated in her Verified Petition (A-6) that the court had jurisdiction under Title 26 USC Sec. 7402, Patel was obligated to investigate the facts, and should have known there is no evidence of "instance" of the United States, and did know there was NO appropriate process (a complaint) (A-42) to grant jurisdiction to the court. But, even if the requirements of 7402 had been met it would not apply to "private citizen" Sherwood because there is NO Legislative Jurisdiction by the fact Title 26 USC has not been enacted into Positive Law as confirmed by Title 1 Sec. 204(a) and even then, there are no required listed implementing regulations indicated in the Parallel Tables of Authorities and Rules for Title 26 USC 7402. Therefore, there is NO authority or jurisdiction by any Statute at Large or implementing regulation published in the Federal Register pursuant to Title 44 USC Sec. 1501 et al. The Verified Petition (A-6) is further flawed by the statement, (Pg. 1 lines 25-27) "...authorized by the Secretary of the Treasury to perform the duties and take the action described in Sections 7602 and 7603", and by the fact the

Summonses (A-4 & 5) state on the back page that the Certificate of Service of Summons is pursuant to section 7603, Internal Revenue Code, which ONLY applies to Title 27 CFR Part 70 of Alcohol, Tobacco, and Firearms, as shown in the Parallel Tables of Authorities (A-43). The Verified Petition (A-6) is further flawed on page 1 lines 19 to 22 for jurisdiction under Title 26 USC Sections 7402 and 7604. Section 7402 and 7604 are not listed in the Parallel Table of Authorities and Rules (A-43) however, an examination of IRC 7604(b) Enforcement of Summons applies ONLY to IRC sections 6420 Gasoline used on farms; section 6421, Gasoline used for certain nonhighway purposes; section 6427, Fuels not used for taxable purposes, and nothing else. The fact that Patel issued the Order Enforcing Summonses (A-10) after being made aware by Sherwood's Opposition Response (A-9) that the Verified Petition (A-6) did not support jurisdictional requirements and informing Patel she had no jurisdiction. "A sanction may not be imposed or a substantive rule of order issued except within jurisdiction delegated to the agency and as authorized by law." Government Organization and Employees, Title 5 USC Sec. 558(b). 20 Am Jur Sec. 59 states,"...Jurisdiction is the power to decide erroneously as well as correctly. The distinction between lack of jurisdiction and any other error affecting a decision of a court is important, since when a court lacks jurisdiction its decision, right or wrong, is void and subject to collateral attack..." This is further supported by;

46 Am Jur 2d Sec. 82. Acts under invalid law or in excess of jurisdiction. Excess of jurisdiction, as distinguished from the entire absence of jurisdiction, means the act, although within the general power of the judge, is not authorized, and therefore void with respect to the particular case, because the conditions which alone authorized the exercise of the general power in that particular case are wanting, and hence the judicial power is not in fact lawfully invoked.

Where there is clearly no jurisdiction over the subject matter, any authority exercised is unsurped authority, and no excuse is permissible if the judge knows of his or her lack of authority. The law requires Proof of Jurisdiction to appear on the record of the administrative agency and all administrative proceedings. Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other. Hagans v. Lavine, 415 U.S. 533 (1974). There is No valid proof of jurisdiction on the agency's record.

DUE PROCESS

Article VI Section 3 of the Constitution mandates that Patel, as a Federal District Judge is bound by her oath of office to ensure due process provisions of the Constitution. Patel denied due process when she failed to ensure compliance with legislative enacted statutes. Being creatures of the legislature, administrative agencies have no general, inherent, or common-law powers, but only those powers conferred upon them by the legislature. ...the source of the powers of administrative agencies lies in statutes, and administrative agencies must find within statutes warrant for the exercise of any authority which they claim.

Patel's failure to assure authorization from the Secretary of the Treasury pursuant to Title 26 USC Sec. 7401 coupled with the fact she knew there was NO Complaint (A-42) from the Attorney General pursuant to Sec. 7402(a) can only mean that Patel not only had no jurisdiction for her actions, but she intentionally violated due process requirements of the Constitution. Procedural due process is addressed in IRC Chapter 76, Judicial Proceedings. Sec. 7401 Authorization: No Civil Action for the collection or recovery of taxes, or for any fine, penalty, or forfeiture shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be

commenced. FRCP Rule 3 states, "A civil action is commenced by filing a complaint with the court." Patel knew, there was NO COMPLAINT as verified by her statement in the transcript (A-42 pg. 3 line 14), and Patel's position as a Federal Judge means she is expected to know her conduct violated statutory and Constitutional rights. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights he (she) should be made to hesitate; and a person who suffers injury caused by such conduct may have cause of action. Pierson v. Ray, 386 U.S. 547 554 (1967). Patel was made aware of flaws in Aguilera's Verified Petition (A-6) Due process was further denied by Patel when she failed to require petitioner Aguilera to attend the Court Ordered Hearing for questions and responses by either Sherwood or the Patel Court to ensure the veracity of the petitioner's claim. Patel's Supplemental Order (A-11) is proof that Patel failed to review Sherwood's Opposition Response (A-9) submissions, further denying due process. Sherwood made no inventive argument (pg. 2 line 12) challenging the 16th Amendment authorization as claimed by Patel, but instead Sherwood relied on substantiate documentation, i.e., the Preface Page of all Titles of the U.S. Code, signed by Speaker of the House of Representatives, Newt Gingrich (A-44) and all Titles to the U.S. Codes under Title 1 Sec. 204(a) (A-45), and every presented exhibit supports the fact Title 26 has not been enacted into positive law, but rather than submit concrete evidence with reference to legislative enacted statutes to rebut Sherwood's claim, Patel dismissed Sherwood's evidence with unsubstantiated remarks (See jointly: Supplemental Order (A-11) and the Transcript (A-42 pg. 6 line 24 thur pg. 8 line 10). Patel is liable for her action of denying due process which contributes to the agency's abuse of power in supporting confiscation of Sherwood's property. Implications are condemning both to IRS and third parties who knowingly participate in IRS initiated scams: No legitimate authority

resides in or emanates from an office which was not legitimately created and/or ordained either by state or national constitutions or by legislative enactment. See variously, United States v. Germane, 99 U.S. 508 (1879), Norton v. Shelby County, 118 U.S. 425, 442, 6 S. Ct. 1121(1866), etc., dating to Pope v. Commissioner, 138 F. 2d 1006, 1009 (6th Cir. 1943).

16 Am Jur 2d Sec. 552. The Constitution provides that neither Congress nor the states may deprive any person of life, liberty or property without due process of law. Regulations governing IRS conduct are acknowledged and intended to preserve 5th Amendment assurances in Title 26 CFR Sec. 601.106(f)(1) Rule 1. An exaction by the U.S. Government which is not based on law, statutory or otherwise, is a taking of property without due process of law in violation of the 5th Amendment to the U.S. Constitution. Supreme Court Justice Blackmum stated in the matter Re: Harlow v. Fitzgerld. I agree with the substantive standard announced by the Court today, imposing liability when a public official defendant "knew or should have known" of the Constitutionally violate effect of his actions. This standard would not allow the official who actually knows that he was violating to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-informed violator of Constitutional right will not evade just punishment for his crimes. I also agree that this standard applies "across the board", to all "government officials performing discretionary functions." Patel failed to cite the specific legislative enacted statutes that granted the agency authority and jurisdiction over "Private Citizen" petitioner Sherwood. Private Citizens have Private rights and the only legislative statutory authority enacted by Congress over Private Citizens is Sec. 7401 as found in Long v. Rasmsussen. The Revenue laws are a code or system in regulation of tax assessments and collection. They relate to

taxpayers, and not to non-taxpayers. The latter are without their scope. No procedure is prescribed for nontaxpayers, and no attempt is made to annul any of their rights and remedies in due course of the law. With them Congress does not assume to deal, and they are neither of the subject nor objects of the revenue law. Long v. Rasmsussen, 281 Fed. Rpt. 236 (1922). It is basic in our law that an administrative agency may act only within the area of jurisdiction marked out for it by law. If an individual does not come within the coverage of the particular agencies enabling legislation the agency is without power to take any action, which effects him. Edencott v. Perkins, 317 U.S. 501. The United States Constitution guarantees every citizen the right of due process in the 4th, 5th and 14th Amendments. In this instance due process requirements were avoided when respondent failed to follow the provisions of Section 7401 requiring a complaint to gain authority and jurisdiction over a private citizen. Patel cannot produce evidence that the petitioner has waived Constitutional Rights by a contract, made in a willing and definite manner, that compels performance, and there is No legal statutes enacted by Congress to provide jurisdiction for collection action by an administrative agency. 16 Am Jur 2d Sec. 439. Constitutional guarantees - Generally. Constitutional guarantees can not be imposed upon or destroyed under the guise or device of being regulated. Individual rights under our Constitution are immutable against all hostile legislation which is not required by consideration of public health or safety and if a law has no other purpose than to chill the assertion of fundamental Constitutional rights by penalizing those who chose to exercise them, then it is patently unconstitutional. The citizens of a free government are justly jealous of their constitutional rights and privileges and this should be attributed to them as a virtue rather than a fault. It keeps them on the alert and inspires them with the courage and determination in their efforts to resist the aggressions of

arbitrary power. It is just as obligatory upon the citizen to resist encroachments upon his rights and liberties guaranteed by the Constitution as it is for him to uphold and maintain its integrity. The right of property has been described as a fundamental right. It is not ex gratia from the legislature but ex debito from the Constitution. It existed before the Constitutions which protect it. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. 16 Am Jur 2d Sec. 581. ...Property in the 14th Amendment embraces all valuable interests which a man may possess outside of himself. In applying the due process clause, differant kinds of property are not distinguished. 16 Am Jur 2d Sec. 583. Patel's Order (A-10) requiring Sherwood to appear and produce records is interests possessed by Sherwood for the convince of the administrative agency. Administrative convenience or necessity cannot override the requirement of due process as found in Russel-Newman Mfg. C. v. N.L.R.B. C.A. Tex. 1966 370 F. 2d 1980. Patel's Order violates due process, but even if Title 26 had been enacted into positive law Patel would still be required to follow due process. Where rights secured by the Constitution are involved there can be no rule making or legislation would abrogate them as found in Miranda v. Arizona, 384 U.S. 436 p. 491.
It is clear that if a statute is repugnant to the Constitution, it must be declared unconstitutional. Marbury v. Madison, 5 U.S. 137, 180 (1803).

Judicial Immunity

The key requirement for judicial immunity is clearly jurisdiction over the subject matter and since Patel has admitted there is no complaint (A-42) this is an admission the jurisdictional requirements of Sec. 7401 were not met, therefore Patel had no jurisdiction over the subject matter,

and absent said jurisdiction there can be no judicial immunity.

20 Am Jur 2d Sec. 59. ... when a court lacks jurisdiction its decision, right or wrong, is void and subject to collateral attack...
Officers of the court have no immunity from liability when violating a constitutional right and may be held personally liable for damages under 42 USC 1983, for they are deemed to know the law. Knowing that they will be liable for all injurious conduct creates incentives for officials to err on the side of protecting citizens constitutionally protected rights. When they violate the constitutionally protected rights, they do so at their own peril. Owen v. Independence, 100 S. Ct. 1398. 1980 (445 U.S., 622 L. Ed. 2d 673); Maine v.Thiboutot, 1980, 100 S. Ct. 2502, 448 U.S. 1, 65 L. Ed. 2d 555, Removes judicial immunity; Hafer v. Melo, 502 U.S. 2l, 1991.

46 Am Jur 2d Sec. 82. ...where there is clearly no jurisdiction over the subject matter, any authority exercised is unsurped authority, and no excuse is permissible if the judge knows of his or her lack of authority.

Supreme Court Justice Blackmum stated in the matter Re: Harlow v. Fitzgerld. I agree with the substantive standard announced by the Court today, imposing liability when a public official defendant "knew or should have known" of the Constitutionally violate effect of his actions. This standard would not allow the official who actually knows that he was violating to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know. Thus the clever and unusually well-informed violator of Constitutional rights will not evade just punishment for his crimes. I also agree that this standard applies "across the board", to all "government official performing discretionary functions."

Is Patel immune from responding to Complaint.

The record indicates Patel failed to respond to the Complaint, although the United States District Court Summons (A-46) informs Patel an answer to the complaint must be made within 60 days after service of the summons and failure to do so will result in judgment by default for the relief demanded in the complaint. This is supported by the Federal Rules of Civil Procedure Rule 8(c), which state that a defendant must plead "any matter constituting an avoidance or affirmative defense". Patel failed to answer the Complaint and the record is void of any evidence of a pleaded defense or responsive pleading in any manner to the petitioner's Complaint.

Federal Rules of Civil Procedure Rule 8(b) Defenses: Form of Denials.A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the avertments upon which the adverse party relies.

Federal Rules of Civil Procedure Rule 8(d) Effect of Failure to Deny.Avertments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Sherwood is entitled to default in this action because Patel failed to respond to the complaint and furthermore, her failure to respond can only be construed as an admission that she knew she lacked jurisdiction, therefore she is liable for her actions.

Judge Wilken Acting As Attorney

The failure of Judge Patel to respond, plead or answer the complaint is an absence of a responsive pleading and the fact that Judge Wilken defended Judge Patel by failing to consider Sherwood's claims and denying motions can only mean that Judge Wilken was acting as an attorney from the

bench in violation of Title 28 Section 454. The record is void of evidence that anyone other than Judge Wilken offered any defense for the respondent. A letter from Assistant U.S. Attorney S. Kamlet (A-22) offering advise to Sherwood went unanswered when Sherwood inquired by letter (A-23) if she (Kamlet) was Patel's Attorney of Record.FRCP Rule 8(c) state that a defendant must plead "any matter constituting an avoidance or affirmative defense", and the summons (A-46) informs the defendant ,"an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this court within a reasonable period of time after service. If the respondent answered the Complaint with a claim of immunity the District Court could most certainly make a ruling based on a defense of immunity, but Patel failed to plead and in the absence of a pleading the petitioner requested a default (A-15) which also was unanswered by Patel, and default should have been granted unopposed, except Judge Wilken supported Patel with arguments from the bench and denied Sherwood's Motion with her Order Denying Plaintiff's Motion for Default Judgment (A-19) thereby acting as an Attorney from the Bench. Examination of the fact that Judge Wilken failed to consider Sherwood's Complaint (A-13) coupled with his compliance with Judge Wilken's Order Setting Case Management Conference (A-14) along with his letter of response (A-16) and Case Management Statement (A-17) all of which resulted in Wilken's' Order Continuing Case Management Conference (A-18) and her disregard for the fact that Patel failed to supply any factual basis for a meritorious defense as pointed out to Wilken in Plaintiff's Motion to Vacate Order Continuing Case Management Conference (A-20) and Plaintiff's Motion to Vacate Order Denying Plaintiff's Motion for Default Judgment (A-21) along with Plaintiff's Motion for

Leave to File a Motion for Reconsideration (A-24) which was denied by Wilken's Order Denying Plaintiff's Motion for Leave to File A Motion for Reconsideration (A-25) and the court's Order of Dismissal (A-26) is evidence that Judge Wilken acted as an Attorney from the Bench and was attempting to protect fellow judge Patel by failing to consider Sherwood's arguments in his Plaintiff's Objection to Court's Order of Dismissal (A-27) with her Order Reaffirming Dismissal of Case (A-28). Consideration to the above listed decisions by Wilken to unopposed arguments submitted by Sherwood can only result in one conclusion, Judge Wilken acted as an Attorney from the Bench in violation Of Title 28 USC Sec. 454.

CONCLUSION

Sherwood cannot stress more strongly for this Court the magnitude of the injustice that will take place not only to him but to the American people if this decision is allowed to stand without ever an opportunity for review by the Supreme Court. The statutory requirements for jurisdiction must be upheld but more importantly the preservation of Constitutional due process outweighs any considerations of legislative enacted statutes, government orders, or administrative agency regulations and Petitioner Raymond B. Sherwood respectfully requests this Court to grant certiorari and fully review the issues raised herein.
Dated this 10th day of May, 1999.

RESPECTFULLY SUBMITTED:

Raymond B. Sherwood
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Pro Per